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by Muhammad Masum Billah



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by Muhammad Masum Billah*

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Abstract

The paper analyzes the main principles of agency under Islamic law as reflected in the Civil Code of Oman and compares them with conventional law. Upon comparative analysis, the paper concludes that the main principles of agency contract under both systems of law are very similar. Some differences do exist in the details and in the application of main principles to some specific cases. While these minor differences may be important in an actual case of agency, they do not make the Islamic law on agency dramatically different from the conventional law on the subject matter.

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I. Introduction

1. General Remarks

The contract of agency is one of the most important contracts in the commercial settings both under Islamic and conventional legal systems. Corporations, partnerships, securities, law firms, firms of accountants, investments, insurance, shipping, all involve contracts of agency. Many products of Islamic banking and finance are tied to the concept of agency in one way or another.¹ The paper analyzes and compares the main principles of agency both under conventional law² and under Islamic law as reflected in the *Civil Code* of Oman.³ The paper concludes that these principles are very similar under both systems. Some differences, however, exist in the details and in the application of main principles to few specific cases. The main principles of agency analyzed in the paper are those mentioned under the *Civil Code* of Oman. These principles include the concept of agency contract, its conditions, and classifications, rights and duties of agents, and the termination of agency relationship.

In 2013 Oman adopted its *Civil Code* containing one thousand and eighty six sections and covering a wide range of topics from basic principles of contract and tort to the specific types of contacts such as sale, lease, loan, guarantee, mortgage, etc. Contract of agency is covered under sections 672 to 698. Like the most provisions in the *Civil Code*, the provisions on the contract of agency reflect mainly the principles of Islamic law on agency. The provisions of the *Civil Code* cover the basic principles of agency. Books on Islamic law contain much more detailed provisions on agency contract. Any gap in the Omani *Civil Code*, however, can be filled from those sources as indicated clearly in the very first section of the *Civil Code*.⁴ In addition, Islamic schools of jurisprudence sometimes differ in their rulings in some aspects of agency. Where

¹ As Islamic banks do not make direct financial loan, most products of Islamic banking in consumer financing involve the sale of a commodity to clients. Initially, the banks appoint their clients as agents to buy the commodity from the market on behalf of the banks. Then the banks sell the same commodity to the clients. The financing of the particular commodity is the very reason the client approaches an Islamic bank in the first place. See BILLAH MUHAMMAD MASUM, Extensive Use of *Hilah* in Islamic Banking and Finance, *Islamic Quarterly*, Vol. 59 (2015) pp. 65-88 at 66-68.

² Our reference to conventional law is mainly to Anglo-American common law as well as to the provisions from various pieces of Omani legislation which are not modelled on Islamic law (e.g., *Commercial Code*, Royal Decree No. 55/90, published in *Official Gazette* (no. 435) (Ministry of Legal Affairs, Oman: July 19, 1990), amended by Royal Decree nos. 3/91 and 75/2010; *Companies Law*, Royal Decree No. 4/74, published in *Official Gazette* (no. 56) (Ministry of Legal Affairs, Oman: June 01, 1974), amended by Royal Decree nos. 54/75, 53/82, 32/84, 13/89, 83/94, 16/96, 26/96, 66/97, 39/98, 85/99, 77/2002, 41/2005, 99/2005; and *Capital Market Law*, 80/98), published in *Official Gazette* (no.635) (Ministry of Legal Affairs, Oman: November 15, 1998), amended by Royal Decree nos. 18/2002 and 5/2007).

³ Royal Decree No. 29/2013; published in *Official Gazette* (no. 1012) (Ministry of Legal Affairs, Oman: May 12, 2013) at 5-199. The literal translation of the title of the code is '*Civil Transactions Law*,' for brevity and convenience, we would use the words '*Civil Code*'.

⁴ Section 1 of *Civil Code* reads, 'The provisions of *Civil Code* in their words and meaning would apply to all issues covered by its provisions as well as to issues not covered by any special legislation. In case there is no specific provision in the *Civil Code*, the court will decide the matter using the provisions of Islamic law. If there is no clear provisions of the Islamic law on the matter, the matter would be decided using the general principles of *shari'ah*. If there is no such general principle of *shari'ah*, the issue would be decided in light of custom.' [Translation is provided by the author.] It is noteworthy that the *Civil Code* did not specify a particular school of jurisprudence in case of differences among various schools on a matter not covered by the *Civil Code*. This may give rise to some uncertainty or inconsistency in the application of Islamic law to actual cases. However, as the majority of Omani citizens follow the Ibaadhi School of Jurisprudence, preference may be given to the opinion of this school over those of others.

relevant, the paper would indicate the view of a particular school or jurist on an aspect of agency.

After a brief discussion on different sets of rules under Omani law to govern the agency contract, the paper would take up the analysis of the main principles of agency under Islamic law as appeared in the *Civil Code* and compare them with conventional law.

2. Different Sets of Rules on Agency Contract in Oman

Oman has three sets of legal provisions on agency contract. The first set was issued in 1977 under the title of *Commercial Agency Law*.⁵ This law mainly governs the issuance of license to individuals and companies which intend to sell the products of foreign manufacturers and suppliers in Oman. In strict legal sense, these individuals and companies may not be considered as 'agents' as they sell the foreign-manufactured products to their buyers through independent contracts made in their own name and *not* on behalf of the foreign manufacturers and suppliers. The second set of provisions on agency is found in sections 276 to 338 of *Commercial Code*, issued in 1990.⁶ These provisions predate the *Civil Code* and would apply to commercial transactions.⁷ On the other hand, the provisions of *Civil Code* on agency would apply to a civil transaction related to agency. This set of the provisions is the focus of our analysis in the paper.

II. Agency under Islamic Law (as Reflected in the Civil Code) and Conventional Law

Part 1: Definition, Conditions, and Classification of Agency

The provisions on agency contract under the *Civil Code* are divided into three groups: general provisions, provisions on the effects of an agency contract, and the provisions related to the termination of an agency contract. General provisions cover the definition of agency contract, its conditions and classifications, and some other related issues. The provisions on the effects of an agency contract are divided into two parts: the obligations of an agent to his/her principal and the obligations of the principal towards the agent. In our analysis, we would follow this structure and the order with occasional cross references among different parts when necessary.

⁵ Royal Decree No. 26/77, published in *Official Gazette* (no. 126) (Ministry of Legal Affairs, Oman: June 01, 1977), amended by Royal Decree nos. 82/84, 73/96 and 66/2005. The Act has twenty two sections in total.

⁶ Royal Decree No. 55/1990, *supra* n. 2.

⁷ See section 1 of *Commercial Code*, *supra* n. 2. Commercial transaction is defined under section 8 of *Commercial Code* as any transaction made for the purpose of earning a profit even if the transaction is made by a non-merchant. Thus, it appears that any agency contract under which the agent works for commission would be a commercial transaction and would be subject to the provisions of *Commercial Code* on agency. However, section 690 of *Civil Code* also covers both paid and voluntary agents. Strictly speaking, the contract of paid agency should be covered by the *Commercial Code*. This inconsistency is probably due to the fact that under Islamic law, upon which the provisions of *Civil Code* on agency are modelled, does not make any distinction between commercial and civil transactions.

1. What is agency?

Agency is defined under section 672 of the *Civil Code* as a contract under which a principal appoints another person in his place to conduct a known and a valid transaction. This definition reflects the concept of agency under Islamic law⁸ and is very similar to the definition of agency under conventional law. For example, the American Law Institute's *Restatement of Law* defines agency as "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."⁹ However, a 'valid transaction' under conventional law may not necessarily be a permissible transaction under Islamic law. For example, buying interest-bearing bonds through an agent (i.e., stock exchange broker) is a valid transaction under conventional law¹⁰ but would be invalid under Islamic law due to the involvement of interest (*riba*) in the transaction.¹¹ Similarly, buying some commodities through an agent when both the price and the delivery of the goods would occur in the future (i.e., a forward contract) would not be a valid contract under Islamic law¹² but can be enforced under conventional law including under the *Commercial Code* of Oman.¹³

The religious validity of a transaction under an agency contract may become important in an Islamic banking and finance transaction involving agency. For instance, in the case *The Investment Dar Company KSCC v. Blom Developments Bank SAL*,¹⁴ two Islamic financial institutions entered into a *wakalah* (agency) contract under which the bank (Blom) appointed the investment company (The Investment Dar) as its agent to invest some fund (US\$11.5 m) in *shari'ah*-compliant instruments with an agreed anticipated profit to be paid quarterly. In 2008, the investment company was unable to pay the anticipated profit and, as a result, the bank brought an action in English court to get its money back together with the anticipated profit. The court of first instance issued summary judgment against the investment company and ordered it to pay the original amount of investment fund. The investment company appealed against the summary judgement and argued that the agency contract was void as it violated Islamic law due to the undertaking of fixed profit in the contract. The UK High Court allowed the appeal against the summary judgment mainly on the ground that the case involved sufficient contentious issues to be resolved in a formal trial.

⁸ For example, in the Ottoman codification of Hanafi law, *The Mejlle* (Book XI) (translated by Judge C. A. Hooper and reproduced in Arab Law Quarterly, Vol. 4 (1989) pp. 244-253) (hereinafter *Mejlle*), agency is defined in article 1449 as "Agency consists of one person empowering some other person to perform some act for him, whereby the latter stands in the stead of the former in regard to such act."

⁹ Cited in MUNDAY RODERICK, *Agency: Law and Principles*, 2nd ed., Oxford 2013, at 1 para 1.01.

¹⁰ See section 87 of *Companies Law*, Royal Decree No. 4/74, *supra* n. 2, which allows a joint-stock company to issue bonds with fixed interest rates.

¹¹ See generally, SALEH NABIL, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking*, Cambridge 1986, at 87-88; BILLAH MUHAMMAD MASUM, *The Prohibition of Riba and the Use of Hiyal by Islamic Banks to Overcome the Prohibition*, Arab Law Quarterly, Vol. 29 (2014) pp. 398-408 at 403.

¹² When both the price and the sold item are deferred, the transaction is considered as a sale of debt for debt. Such sale is not permitted under Islamic law. See USMANI MUHAMMAD, *Introduction to Islamic Finance*, Karachi 2010, at 187.

¹³ This can be implied from the reading of section 100 (which allows the sale of goods not available at the time of the contract) together with section 113 (which indicates that the price can be deferred) of *Commercial Code* of Oman, *supra* n. 2.

¹⁴ *The Investment Dar Company KSCC v. Blom Developments Bank SAL* [2009] (EWHC 3545 (ch)).

2. Conditions of agency

The conditions of agency mentioned under section 673 of the *Civil Code* are: 1) the principal must himself have the legal right to enter the transactions which he delegates to an agent, 2) the agent must have the legal capacity to complete the delegated transaction, and 3) the delegated transaction or activity is known and is suitable for delegation.

These conditions of agency under the Omani *Civil Code* reflect Islamic law on the matter and are very similar to those under conventional law. Under both Islamic law and conventional law, a person can delegate an act to another person only if the former can complete the act by him- or herself.¹⁵ In other words, the principal must have the legal capacity to do the delegated task by himself. Although this general principle is applicable both under Islamic law and conventional law, its application would bring different results to some specific cases based on the contractual capacity of a person under the relevant Islamic or conventional laws. For example, under the common law an enemy alien does not have the legal capacity to enter into a contract with a local resident. Thus, any contract made on behalf of such a person by a local agent would be void *ab initio*.¹⁶ In the context of Islamic law, non-Hanafi schools view that a woman does not have the legal capacity to marry herself without the permission of her guardian. As such, she also lacks the capacity to appoint an agent to accept a marriage proposal on her behalf. Similarly, as the non-Hanafi schools do not allow a person in *ihram* (i.e., in the state of ritual purity for pilgrimage) to marry, such a person cannot also appoint an agent for the same purpose.¹⁷

In determining the above condition, the main emphasis lies on the legal capacity of the principal as opposed to his physical capacity. For example, even though it is physically impossible for a company as an inanimate juristic person to enter into contract, the company has the legal capacity to make such contract and thus can appoint an agent (e.g., directors or employees) to enter into many legal transactions.¹⁸ Similarly, a blind person does not have the required physical capacity to enter into a transaction which requires the inspection of sold items. However, a blind person can appoint an agent to enter into such a transaction on his behalf.¹⁹ In fact, one of the very reasons a person may appoint an agent is that it is physically impossible for the principal to be present in more than one place at the same time to look after his various business interests.

Like the principal, the agent too must have the legal capacity to complete the delegated task. Thus, as the non-Hanafi schools do not allow a woman to get married by herself without the

¹⁵ See article 1459 of *Mejelle*, *supra* n. 8; ARCHER GLEASON, *The Law of Agency*, Chicago 1915, at 46 ("Generally speaking, anything that a principal may lawfully do if acting in person he may delegate to agents.").

¹⁶ See *Boston Deep Sea Fishing & Ice Co Ltd v. Farnham (Inspector of Taxes)*, [1957] 3 All ER 204.

¹⁷ See AL-ZUHAILI WAHBAH, *Financial Transactions in Islamic Jurisprudence*, (translated by Mahmoud A El-Gamal), Beirut 2011, at 638 (v.1).

¹⁸ The *Civil Code* of Oman recognizes the legal personality of companies. See section 48(4) of the *Civil Code*, *supra* n. 3. While classical Islamic jurisprudence is silent about the legal personality of a business organization, many contemporary Islamic scholars approve the concept of legal personality under Islamic law. See OIC (Organization of Islamic Conference) Fiqh Academy Decision no. 63/1/7 (paragraph 12), seventh session, May 9-14, 1992, in *Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000*, Jeddah 2000, at 130; also USMANI, *supra* n. 12 at 221-232.

¹⁹ See AL-ZUHAILI, *supra* n. 17 at 638.

permission of her guardian, she cannot be also an agent to conduct a marriage for others.²⁰ As for the minor who reached the discerning age (*sinn al tameez*) but not the age of majority (*sinn al rushd*),²¹ even though he may not appoint an agent to conduct a financial transaction unless the transaction is beneficial for the minor,²² there appears to be no restriction under the Omani *Civil Code* on such a minor to act as an agent.²³ The provision reflects the view of the Hanafi School, which allows such a person to act as an agent even if he cannot do a similar task for himself.²⁴ This view is more sensible as the role of a minor in such a situation is simply to follow the order of his principal. The maturity of the person who issues the order is more important than that of the person who follows the order. Conventional law on agency also adopts this approach in allowing a minor to act as an agent. As long as a minor is mentally and physically fit to carry out the delegated task, any transaction entered by him in carrying out the task on behalf of his principal is valid.²⁵

The third condition of an agency contract is that the delegated task must be suitable for delegation. Not every action can be delegated under Islamic law. Thus, pure acts of worship (*'ibadah*) such as prayer, fasting etc. are not suitable for delegation to others as they require personal performance and piety.²⁶ Although there are differences of opinion about the delegation of an act of worship which also has financial dimension such as pilgrimage to Mecca and compulsory alms tax (*zakah*), the *Civil Code* is silent on this matter. As they are personal religious obligations, the *Civil Code* did not side with one opinion over the other. People are free to choose whatever view they find acceptable to them.

Finally, the delegated transaction or activity must be known.²⁷ Thus, an agency contract is not valid if the object of agency is not clearly identified. For example, if the principal asks the agent to buy an animal without specifying its genus and type, the agency is not valid due to excessive *gharar* (uncertainty).²⁸ Similarly, if the principal asks the agent to buy a piece of land without specifying its location and price, the agency is not valid.²⁹ In conventional law, on the other hand, an agent with ambiguous instructions must try to get clarification from the

²⁰ See AL-ZUHAILI, *supra* n. 17 at 639.

²¹ Under the *Civil Code* of Oman, *supra* n. 3, a child who has reached seven years of age is considered a discerning child (section 42(2)). On the other hand, the age of majority (*sinn al rushd*) is eighteen years (section 41(2)).

²² See section 93 of *Civil Code*, *supra* n. 3. Where a transaction (e.g., trading) may bring either profit or loss, a discerning child can appoint an agent only if the child is given permission by his guardian to do such tasks or if the child ratifies the transaction upon reaching the age of majority. See article 1457 of *Mejelle*, *supra* n. 8; see also section 93 of the *Civil Code*, *ibid*. This is the view of Hanafi School. Other schools do not allow such agency mainly because such a child is not allowed to enter into this type of transaction by himself. See AL-ZUHAILI, *supra* n. 17 at 638.

²³ Section 94 of *Civil Code*, *supra* n. 3, provides that a minor who was given 'permission' to enter into a transaction would be treated like a person who has reached the age of majority (*sin al-rushd*). Under section 679 of *Civil Code*, permission is one of the means through which agency can be established.

²⁴ See article 1458 of *Mejelle*, *supra* n. 8. The view is supported by the incident of the Prophet (PBUH) appointing Ibn Umm Salamah as his agent to conduct the Prophet's marriage.

²⁵ ARCHER, *supra* n. 15 at 30-31. See *Talbot v. Bowen*, 1 A. K. Marsh (Ky.) 436, R. 42, H. 40, where a contract entered by a minor on behalf of his father was held valid.

²⁶ The Maliki scholars do not allow agency for pilgrimage to Mecca on the ground that the financial aspect in the pilgrimage is minor and transitory.

²⁷ Section 673 of *Civil Code*, *supra* n. 3.

²⁸ See the second paragraph of article 1459, article 1468, and articles 1475-1477 of *Mejelle*, *supra* n. 8.

²⁹ Article 1475, and also articles 1476 and 1477 of *Mejelle*, *ibid*.

principal. If it is not possible to get the timely clarification, the agent is to try his best to ascertain the reasonable meaning of the instructions and work accordingly.³⁰

3. Classification of Agency

There are four types of agency mentioned under sections 674 and 675 of the *Civil Code*: unrestricted (*mutlaq*) agency, restricted (*muqaiyad*) agency, general or comprehensive ('*aam*) agency, and special (*khas*) agency. A general agency (also known as 'universal or comprehensive agency') covers all transactions which a principal can do by himself or herself provided that the transactions can be legally delegated.³¹ Under section 677 of the *Civil Code*, however, even a general agency would not cover the following transactions unless they are specifically mentioned in the agency contract: donations, settlement, debt forgiveness, arbitration, loan, and matters related to personal status (*al ahwal al shaksiyah*).

On the other hand, a special (*khas*) agency would exist if the delegated authority is confined to one or more specific activities.³² In such case, the agent is allowed to do only the specified activity on behalf of the principal and the necessary related activities.³³ For example, an agent authorized to sell a car of his principal has to complete the procedures related to the transfer of ownership and insurance to the new buyer. However, if the task has various aspects and each aspect requires special skill and is usually done by separate individuals, an agent authorized for one aspect of the whole task is not automatically authorized for the other aspect/s of the task unless mentioned specifically in the agency contract. This is mainly due to the fact that an agent may not have the necessary skills for all aspects of a large complicated transaction. For example, section 687 of the *Civil Code* provides that an agent for collection [of debt] does not have the authority for litigation and the agent for litigation cannot collect the compensation awarded after such litigation unless there is specific permission from the principal. This reflects the view of the majority of Islamic jurists with the exception of some earlier Hanafi jurists.³⁴

Both general agency and special agency may be unrestricted (*mutlaq*) agency. For example, if an agent is authorized to sell a car of his principal without any specifications or restrictions from the principal with regard to the price, time, and place of the sale, this would be an example of special (*khas*) but unrestricted (*mutlaq*) agency. The agent can sell the car at any time to anyone and at any suitable price.³⁵ On the other hand, if the principal fixed the price or a

³⁰ See MUNDAY, *supra* n. 9 at 49-50 para 3.14-3.15. See also *Ireland v. Livingston* (1820) 3 B & Ald 616; cited in MUNDAY, *ibid* at 49 para 3.14.

³¹ Section 675 of *Civil Code*, *supra* n. 3. A general agency is not permissible according to Shafii' and Hanbali Schools due to massive uncertainty (*gharar*). On the other hand, the Hanafi and Maliki Schools allow this kind of agency on the ground that when each of the tasks under a general agency can be delegated separately, all these tasks can be also delegated together under a general agency. AL-ZUHAILI, *supra* n. 17 at 634.

³² Section 675 of *Civil Code*, *supra* n. 3.

³³ Section 676 of *Civil Code*, *ibid*.

³⁴ AL-ZUHAILI, *supra* n. 17 at 655; articles 1519 and 1520 of *Mejelle*, *supra* n. 8. As for debt collection, the earlier Hanafi jurists differentiated between the collection of fungible and the collection of non-fungible debt. In the case of fungible debt such as money, the agent has the right to engage in legal dispute because in such case the agent is considered as the contracting party for collecting debt like the case with a sale contract. As for non-fungible, the agent is not allowed to engage in litigation. The agent in such case is considered merely a messenger and not an agent. See AL-ZUHAILI, *ibid* at 656-658.

³⁵ According to non-Hanafi jurists, an unrestricted agent is not allowed to make any admission of liability on behalf of his principal because he is appointed to establish the rights of the principal. Hanafi scholars allow a legal agent to make admission of liability as long as it does not result in legal punishment or legal revenge (*qisas*). Similarly, non-Hanafi jurists

specific buyer, the agent cannot sell the car below that price or to anyone other than the specific person. However, the agent is allowed to sell at a higher price as that would be beneficial for the principal.³⁶ A general ('*aam*) agency can be also restricted (*muqaiyad*). For example, even if an agent has the authority to do any transaction on behalf of the principal, the principal may require the agent to inform the former before completing a transaction if the transaction involves a large amount of money.³⁷

The classification of agency under Islamic law as stated in the *Civil Code* is very similar to the types of agency under conventional law. For example, in his classical book on agency Professor Gleason Archer mentioned three types of agents: universal agent, general agent, and special agent.³⁸ A universal agent has the authority to enter into any delegable transaction on behalf of the principal. This is very similar to the universal ('*aam*) agency under Islamic law. On the other hand, a general agent is authorized to make any transaction in a particular area of principal's business or any transaction at a particular place, whereas a special agent is authorized to make a specific transaction or a series of specific transactions on behalf of the principal. A general agent under conventional law is similar to *mutlaq* agent under Islamic law, whereas special agency under conventional law can be considered as either as *khas* or as *muqaiyad* agency under Islamic law.

The above classification of agency does not give rise to much problem in the actual cases of agency as the type and scope of an agent's authority would be determined from the wording of the principal's instructions. If an agent exceeds his authority, the agent would be liable to the principal for any loss the principal suffers both under Islamic law and conventional law.³⁹ However, under conventional law a principal may be bound by certain unauthorized transactions of his agent entered with a third party if the transactions fall under either implied or apparent authority of the agent. It is not clear whether the same result would follow under Islamic law. In general, under Islamic law a principal is not bound by any transaction of the agent beyond the scope of his authority.⁴⁰ The cases of implied authority under conventional law cover the situations where some aspects of an agent's usual activities are restricted by the principal but the agent still engages in such a restricted activity. In such cases, the principal would be bound by a transaction of the agent with a third party who is unaware of such restriction.⁴¹ On the other hand, the cases of apparent authority under conventional law

and majority of Hanafi jurists opine that an unrestricted selling agent is implicitly restricted to sell at a market price or at a price close to the market price and must sell at cash price. Abu Hanifa, on the other hand, allows an unrestricted selling agent to sell at any price he sees fit. This view was adopted in article 1494 of *Mejelle*, *supra* n. 8. As for an unrestricted buying agent, all jurists agree that such an agent must buy at or close to the going market price. The different opinions of Abu Hanifa with regard to selling and buying agents is due to the fact that a buying agent may buy something for himself first at a price which he may later regret and may pass the purchased item to his principal. This possibility does not exist in the case of a selling agent and he is thus given wider discretion. See AL-ZUHAILI, *ibid* at 653-655, 661-663.

³⁶ See section 680 of *Civil Code*, *supra* n. 3.

³⁷ Following the view of most jurists with regard to an unrestricted special agent, it can be argued that a general agent would be also implicitly restricted by conventions and customs. See the discussion in *supra* n. 35.

³⁸ ARCHER, *supra* n. 15 at 11-12.

³⁹ See ARCHER, *ibid* at 121-122; section 680 of the *Civil Code*, *supra* n. 3.

⁴⁰ See generally article 1470 of *Mejelle*, *supra* n. 8; section 680 of the *Civil Code*, *ibid*.

⁴¹ See *The Unique Mariner* [1978] 1 Lloyd's Rep 438, where an agreement entered by the master of a ship with a salvage tug was held to be binding on the owner of the ship despite the fact that the owner of the ship expressly instructed the master to use only the salvage tug sent by the owner.

include situations where an agent does not have the authority to enter into a particular transactions but he appears to have such authority because of certain representation (i.e., action or omission) of the principal.⁴²

Both Islamic law and conventional law recognize the subsequent ratification by the principal of an earlier unauthorized transaction entered by an agent. Such ratification makes the transaction effective retrospectively from the date it was entered. Section 679 of *Civil Code* provides that a subsequent ratification is equivalent to prior permission.⁴³ Thus, an unauthorized act of an agent could be later ratified by the principal and the transaction would be valid.⁴⁴

Part 2: Duties and Rights of an Agent

1. Duties of an agent

a) Duty to follow the instructions of the principal

An agent must not exceed his authority. Fulfillment of this duty would be important when the agency is restricted (*muqaiyyad*), or special (*khas*). In such cases, the agent has to exactly follow the principal's instructions including restrictions, if any, unless he can prove that the transaction would bring greater benefit for his principal despite the fact that he did not follow the exact instructions or restrictions.⁴⁵ For example, an agent authorized to sell a product at a specified price (e.g., RO1,000) can sell it at a higher price, say, RO1,100. Similarly, if an agent authorized to buy a property at a specific price is able to buy it at a lower price, the contract would be binding on the principal.⁴⁶ Under conventional law too, one of the most important obligations of an agent is to follow the instructions of the principal. The failure of an agent to follow the instructions of his principal would make the agent liable for any loss suffered by the principal.⁴⁷ On the other hand, an agent would not be liable for any financial losses suffered by

⁴² See *Summers v Solomon* (1857) 7 E1 & B1 879, where the principal was held bound by a transaction entered by a former employee (agent) with a wholesale merchant with whom the principal had regular credit transaction through that employee. The principal failed to inform the merchant about the termination of employment of that employee.

⁴³ See articles 1442 and 1443 of *Mejelle*, *supra* n. 8. Article 1443 of *Mejelle* reads, "Subsequent ratification has the same effect as a previous authorization to act as agent."

⁴⁴ For conventional law, see *Williams v. North China Insurance Co*, (1876) 1 CPD 757, where an agent entered into an insurance contract on behalf of the principal without the authorization but the principal was allowed to ratify the insurance contract after the loss of the insured property (i.e., ship).

⁴⁵ Section 680 of *Civil Code*, *supra* n. 3.

⁴⁶ See article 1479 of *Mejelle*, *supra* n. 8. Hanafi jurists made a distinction in this regard between a buying agent and a selling agent. When a buying agent buys something without following the instructions of the principal and the transaction is not beneficial for the principal, the agent would be considered the buyer of the product. On the other hand, when a selling agent fails to follow the instructions of his principal to the disadvantage of his principal, the contract of sale would be suspended upon the approval of the principal. See articles 1470 and 1494 of *Mejelle*, *supra* n. 8. This is due to the possibility that a buying agent may buy something for himself and may give it to his principal when the agent realizes the transaction was disadvantageous. This kind of possibility does not exist in the case of a selling agent. See AL-ZUHAILI, *supra* n. 17 at 667. On the other hand, if the agency of a buying agent is unrestricted, most Islamic jurists still state that the agent's actions would be implicitly restricted by conventions i.e., the purchased item must be free from defect and fit for the purpose and the price should be close to or below the market price. AL-ZUHAILI, *ibid* at 667-668.

⁴⁷ See *Turpin v Bilton* (1843) 5 Man & G 455, where an agent was liable for the loss of uninsured vessel because the agent neglected to follow the instructions of the principal to insure the vessel.

the principal when the agent follows the instructions even if the instructions appeared to be a bit imprudent from the very beginning.⁴⁸

A transaction entered by an agent in violation of the principal's instructions, especially as to the nature of the thing to be purchased, would be considered as a transaction concluded for the agent himself and not for the principal.⁴⁹ For example, if the principal asks the agent to buy a goat but the agent buys a sheep, the contract would be concluded for the agent and not for the principal.⁵⁰ Under conventional law, a similar result would also ensue unless the third party to the transactions can prove that the action falls under the agent's implied or apparent authority. However, the principal may bring a recourse action against the agent for such an unauthorized but binding transaction.⁵¹ As mentioned earlier, both under conventional law and Islamic law the principal may ratify an unauthorized transaction and would be bound by the ratified transaction.

b) Duty to exercise due care

In performing the tasks assigned, an agent must exercise proper care i.e., care which a reasonable person in the agent's position would exercise. This is especially the case if the agent works for fees.⁵² If the agent is not a paid agent, he still has to exercise the level of care which he would exercise in his personal transaction.⁵³ In other words, even a gratuitous agent has to perform the task with certain degree of care. Such an agent would be liable for negligent performance unless he could prove that he would have conducted the transaction in the same manner even if it were for himself. The difference in the levels of care required to be taken by a paid agent and a gratuitous agent is that the former has to take reasonable level of care (an objective test) while the latter has to take subjective level of care (i.e., the level of care he would take for his personal transaction).

Under conventional law, however, both a commissioned agent and a gratuitous agent have to exercise reasonable care in performing the delegated task.⁵⁴ Another difference maintained in the conventional law is between *nonfeasance* (non-performance of the delegated task) and *misfeasance* (negligent performance of the delegated task). While a gratuitous agent would be liable only for misfeasance,⁵⁵ a paid agent would be liable for both nonfeasance and misfeasance.⁵⁶ The reason for the difference lies in the doctrine of consideration. As there is no

⁴⁸ See *Overend & Gurney Co v Gibb*, (1871-72) LR5 HL 480, where the purchase of an existing business by the directors of a new company turned out to be a financial disaster, the directors (i.e., agents) were not held liable.

⁴⁹ Article 1470 of *Mejelle*, *supra* n. 8.

⁵⁰ Article 1471 of *Mejelle*, *ibid*.

⁵¹ See ARCHER, *supra* n. 15 at 189-191.

⁵² Section 681 of *Civil Code*, *supra* n. 3.

⁵³ Section 681 of *Civil Code*, *supra* n. 3.

⁵⁴ See *Solomon v Barker* (1862) 2 F&F 726, where selling agents were held liable for not exercising due care to ensure the best price for the goods sold on behalf of the principal; see also section 277 of the *Commercial Code*, *supra* n. 2.

⁵⁵ See *Chaudhry v Prabakhar*, [1989] 1 WLR 29, where a friend (i.e., a gratuitous agent) who helped a new driver to buy a used car was found negligent and liable for the un-roadworthy car.

⁵⁶ See ARCHER, *supra* n. 15 at 188-189.

consideration in the case of a gratuitous agency, the agent would not be liable for any failure to perform the promised task.⁵⁷ Under Islamic law on agency, this distinction is not maintained.

c) Duty to avoid conflict of interest

Under both Islamic law and conventional law, an agent must not have any conflict of interest in a transaction concluded for his principal. Thus, under Islamic law an agent who is authorized to purchase a specific object or a unique item (e.g., a specific house) cannot buy it for himself.⁵⁸ If the agent buys the specific object for himself, the purchase would be considered as a transaction for his principal.⁵⁹ Similarly, an agent authorized to purchase a product (e.g., a horse) for his principal cannot sell the agent's own product to his principal.⁶⁰ Doing so would put the agent in a situation where his personal interest as a seller would conflict with the interest of his principal as a buyer. This is the view of the majority of Islamic jurists.⁶¹

Although a similar conflict would arise if a selling agent sells a product of his principal to himself or to any of his close relatives, the *Civil Code* of Oman is silent about the invalidity of such transaction. This is probably due to the difference of opinions among Islamic schools of law. For example, Hanafi School does not allow a selling agent to sell the product of his principal to himself,⁶² while some jurists from other schools see no problem with such a sale.⁶³

It is noteworthy here that Islamic law on agency and the *Civil Code* of Oman do not provide a general or normative principle on conflict of interest in the context of agency. Islamic law only discusses some specific examples where a conflict of interest would arise. In this regard, conventional law on agency is broader and would cover any conflict of interest no matter how they come to exist. Under conventional law, agents are considered as a fiduciary and owe single-minded loyalty towards their principals. As such, agents cannot make any profit other than their commission out of the transactions they bring into conclusion for their principals without the knowledge or permission of the principals.⁶⁴

d) Duty to perform the delegated task personally

Under Islamic law, an agent must personally perform the task he is assigned for.⁶⁵ He cannot delegate the work to another agent without the permission of the principal.⁶⁶ For example, a

⁵⁷ ARCHER, *ibid* at 189.

⁵⁸ Section 688 of the *Civil Code*, *supra* n. 3.

⁵⁹ Article 1485 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 668.

⁶⁰ Section 688 of the *Civil Code*, *supra* n. 3. According to Imam Abu Hanifa, a buying agent is not also allowed to buy from his close relatives whose testimony for the agent would not be acceptable in a court of law. As for Abu Yusuf and Mohammad, such purchase is allowed as long as the price paid is at or below the market price. AL-ZUHAILI, *ibid* at 669.

⁶¹ Article 1488 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 669.

⁶² Article 1496 of *Mejelle*, *supra* n. 8. Imam Abu Hanifa does not allow a selling agent to sell even to his close relatives, whose testimony for him would not be allowed in courts (e.g., father, son, wife, grandson etc.), at or below the market price because family members may share the use of such property. This view was adopted in article 1497 of *Mejelle*, *supra* n. 8. On the other hand, Abu Yusuf and Mohammad allow such sale at market price because family members do not share the ownership. See AL-ZUHAILI, *ibid* at 664-665.

⁶³ AL-ZUHAILI, *ibid* at 665.

⁶⁴ See MUNDAY, *supra* n. 9 at 161-169 para 8.15-8.28; ARCHER, *supra* n. 15 at 193-195.

⁶⁵ Section 683(1) of *Civil Code*, *supra* n. 3.

legal agent appointed to represent the principal in a case cannot delegate the task to a second agent without the permission of the principal.⁶⁷ This is because the principal has probably hired a specific agent for his or her special skills, personal honesty, and other individual qualities. The second agent may not have those qualities. If, however, the principal permits the agent to hire a sub-agent and specifies the sub-agent, the sub-agent would be considered as a direct agent of the principal and not as an agent of the first agent.⁶⁸ On the other hand, if the permission to appoint a sub-agent is general and does not specify the sub-agent, the first agent would remain responsible for any fault in appointing the sub-agent or in giving him instructions.⁶⁹

Conventional law on the appointment of sub-agent contains similar rules. In general, an agent cannot delegate his authority to a sub-agent without an express or implied authorization of the principal. A legal doctrine under conventional law states, 'delegated authority cannot be delegated.'⁷⁰ Thus, the principal would not be bound by a transaction entered by a sub-agent appointed without any express or implied authorization unless the principal later ratifies the transaction.⁷¹ On the other hand, if a sub-agent is appointed with the express or implied authority of the principal, the first agent would not be liable for any fault or negligence of the sub-agent.⁷² Like the case with Islamic law, under conventional law also the liability of the first agent is limited to the negligence of the first agent in selecting the sub-agent.⁷³ The instances of implied authority to appoint sub-agents include the situations when it is customary to do so in a particular business, or when the nature of the transaction requires such appointment.⁷⁴ If the sub-agent is appointed with the express or implied authorization of the principal, the sub-agent becomes a direct agent of the original principal.⁷⁵

If multiple agents are appointed for the same task, they may be appointed either under one contract or under separate contracts. If they are appointed under one contract and the contract does not specify separate aspects of the task for each agent, they must perform the task jointly unless the particular activity cannot be completed jointly (e.g., oral legal defense) or the nature of the transaction does not require any consultation with each other (e.g., debt collection or debt payment).⁷⁶ On the other hand, if multiple agents are appointed under separate contracts

⁶⁶ This is the general rule. All schools make some exceptions to the general rule. For example, Hanafi jurists allow the appointment of a second agent if the principal gives the agent wide discretion to do whatever is necessary to accomplish the task. In such case, the agent (e.g., a debt collecting agent) can appoint a second agent to do the task. If no such discretion is given, the appointment of the second agent is invalid. In the context of debt collection, the collection of debt by such an unauthorized second agent would not discharge the debtor from his liability toward the creditor. The Shafi'i and Hanbali jurists allow a second agent if the first agent is not able to perform the task. The Maliki jurists allow the appointment of a second agent if the performance of the task is against the social status of the first agent. See AL-ZUHAILI, *supra* n. 17 at 658-659; article 1466 of *Mejelle*, *supra* n. 8.

⁶⁷ AL-ZUHAILI, *ibid* at 656; article 1463 of *Mejelle*, *supra* n. 8.

⁶⁸ Section 683(1) of *Civil Code*, *supra* n. 3.

⁶⁹ Section 683(2) of *Civil Code*, *ibid*.

⁷⁰ See ARCHER, *supra* n. 15 at 100-101. This is based on a Latin maxim, *Delegata potestas non potest delegari*; cited in ARCHER, *ibid* at 101.

⁷¹ See ARCHER, *supra* n. 9 at 174-177.

⁷² *Dorchester & M. Bk. v. N. E. Dk.*, 1 Cush (Mass.) 177; cited in ARCHER, *supra* n. 15 at 103.

⁷³ See *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; cited in ARCHER, *supra* n. 15 at 104.

⁷⁴ ARCHER, *supra* n. 15 at 101-103.

⁷⁵ ARCHER, *supra* n. 15 at 104; see also section 279 of the *Commercial Code of Oman*, *supra* n. 2.

⁷⁶ Section 682(2) of *Civil Code*, *supra* n. 3.

for a task, they should act independently unless the principal asks them to work jointly.⁷⁷ When the task is supposed to be completed jointly by multiple agents, all the agents would be jointly liable for the task.⁷⁸ The provisions of the *Civil Code* with regard to multiple agents reflect mainly the view of Hanafi School.⁷⁹

In this regard too, the approach of the conventional law appears to be mostly similar to that of Islamic law i.e., the instructions and the intention of the principal would determine whether multiple agents are supposed to work jointly or separately. Thus, when a principal appoints multiple agents to perform the same task, the agents must act jointly unless expressly indicated otherwise. If one of the agents acts alone, the transaction would not be binding on the principal.⁸⁰

e) Duty to protect the principal's property

Both under Islamic law and conventional law, an agent must protect the property of his principal under his control. In Islamic law, the legal status of the principal's property under an agent's control is that of a deposit.⁸¹ As such, the agent is not responsible for any loss of or damage to the property unless such loss or damage is due to the agent's negligence or transgression.⁸² However, an exception to the above rule is mentioned in *Mejelle*.⁸³ When a purchasing agent buys a product for his principal with the agent's own money or on credit and retains the purchased product in order to secure the payment of the price from the principal, the loss of the product in such case would be borne by the agent. This is probably due to the distinction Hanafi School makes between 'deposit' and 'pledge'. When the agent holds the purchased object as a means to ensure the payment of the price, the status of the purchased product in the hand of the agent would change from 'deposit' to 'pledge'. Destruction of the pledged property in the possession of a pledgee creditor would dissolve the debt up to the value of the pledged property.⁸⁴ In case of any dispute between the principal and the agent with regard to the cause of the loss, the statement of the agent would be accepted if supported by an oath under Islamic law. The principal can prove otherwise by bringing evidence.⁸⁵

⁷⁷ Section 682(1) of *Civil Code*, *ibid*.

⁷⁸ Section 682(3) of *Civil Code*, *ibid*.

⁷⁹ See article 1465 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 679-681.

⁸⁰ See ARCHER, *supra* n. 15 at 41-42; *Loeb & Bro. v. Drakeford*, 75 Ala. 464 H. 42; cited in ARCHER, *ibid* at 42.

⁸¹ This is regardless of whether the agent is considered as a 'messenger' or 'agent'. See articles 1463, 1464, and 1500 of *Mejelle*, *supra* n. 8; see also AL-ZUHAILI, *supra* n. 17 at 675-677.

⁸² Section 685 of *Civil Code*, *supra* n. 3.

⁸³ See article 1492 of *Mejelle*, *supra* n. 8.

⁸⁴ Even though Hanafi School considers a pledged property in the possession of a creditor as a possession of 'trust,' the School changes the status of the pledged property into the possession of 'guarantee' with regard to its financial consequence in securing the debt. Thus, the destruction of the pledged property would be the destruction of the guarantee and would absolve the debt up to the value of the pledged property. On the other hand, the non-Hanafi schools consider the possession of the pledged property by the creditor as the possession of trust under all circumstances. The destruction of the trust in the possession of trustee (the pledgee creditor) would not bring any liability on the trustee unless the destruction is due to any negligence or transgression on the part of the trustee. As a result, the destruction of the pledged property in the possession of the creditor would not absolve the debt. See AL-ZUHAILI, *supra* n. 17 at 166-167 (v. 2)

⁸⁵ Hanbali jurists require proof from the agent if the cause of the loss claimed by the agent is fire, breakage, or any other observable events. AL-ZUHAILI, *supra* n. 17 at 675-676. The general rule under Islamic law is that default position can be supported by an oath and any exception to the default position must be proven by evidence. For example, if there is any

Under conventional law too, an agent is not liable for the loss of or damage to any property of his principal due to any external cause or inherent defect in the property.⁸⁶ In other words, the agent would be liable for the loss or damage of the property only if the loss or damage is caused by the agent's own negligence. If there is dispute with regard to the cause of the loss, the agent has to prove an external cause or inherent defect in order to avoid liability.⁸⁷

f) Duty to disclose the identity of the principal

As for the agent's duty to disclose the name of his principal in a transaction, Islamic law on agency sometimes makes a distinction between an 'agent' and a 'messenger'. When a person enters into a transaction on behalf of someone else and discloses the identity of the person for whom the former is making the transaction, the former is considered as a messenger of the latter. If the identity of the latter is not disclosed, the former is considered as an agent. An example is given under article 1454 (2) of *Mejelle*,

"A sends B to a horse-dealer to buy a horse. B tells the horse-dealer that A wishes to buy a certain horse from him. The horse-dealer informs B that he has sold A the horse for so much money and asks B to inform A of this fact, and to deliver the horse to him. B does as requested and hands the horse over to A. A accepts forthwith. A sale has been concluded between A and the horse-dealer. B has merely been a messenger and intermediary between the two, and not an agent."

However, no such distinction is made under conventional law on agency. In fact, the above example would be considered as an example of agency under conventional law. Under ordinary circumstances, an agent must indicate in a contract entered with a third party on behalf of his principal that that he is acting as an agent. Otherwise, the agent can be sued personally by the third party for the contractual obligations.⁸⁸ However, the difference between Islamic law and conventional law here seems to be a matter of terminology and nomenclature ('agent' v. 'messenger'). In practice, both Islamic law and conventional law would consider the above transaction concluded between the principal and the third party.⁸⁹

Even Islamic law on agency does not always maintain the above distinction between 'agent' and 'messenger'. Under Islamic law, there are some transactions in which an agent must mention the name of the principal. Otherwise, the transaction would be considered as concluded for the agent himself. Strictly speaking, these transactions should be considered as concluded *not* by an 'agent' but by a 'messenger' because under Islamic law when a person mentions the name of the person on whose behalf he is entering the transaction, he is considered simply as a 'messenger'. However, Islamic schools refer such intermediaries as

disagreement about the existence of an agency, the default state is non-agency. Thus, if a supposed principal claims non-existence of an agency, the principal would be believed if he takes an oath. AL-ZUHAILI, *ibid* at 677.

⁸⁶ Section 283 of *Commercial Code*, *supra* n. 2.

⁸⁷ See 283 of *Commercial Code*, *supra* n. 2. Section 283 makes the agent liable for any loss of the principal's property under his possession unless the agent can prove an external cause or inherent defect in the property.

⁸⁸ See ARCHER, *supra* n. 15 at 125-127.

⁸⁹ See also articles 1461(3) and 1462 of *Mejelle*, *supra* n. 8.

agents. These transactions include marriage, gift-giving, donation, deposits, loans,⁹⁰ pawning, partnerships and silent partnership.⁹¹ Similarly, section 684 of *Civil Code* also states that the name of the principal must be indicated in the following transactions: donation, borrowing, pledge (mortgage), deposits, giving loans, partnership, silent partnership, settlement on denial of rights.⁹²

Also, in some transactions the agent must clearly indicate whether he is making the transaction for himself or for his principal. Indication that he is acting on behalf of someone else does not change his status from 'agent' to 'messenger'. These transactions include contracts of purchase or sale, lease, and settlement on admission of rights.⁹³ This rule reflects the view of the majority of Islamic jurists. If the agent relates these contracts to his principal within the limits of his authority, then all the rights of the contract will be for the principal and the principal would be the contracting party. If the agent makes himself a party to these contracts without declaring that he is contracting in his capacity as an agent, then the rights of contract will be for him.⁹⁴ Contract rights include the receipt of goods or price, the return of the sold goods due to defect or based on inspection option etc.⁹⁵

Under conventional law, a properly authorized transaction concluded by an agent in which the agent does not disclose the identity of the principal will still be binding on the principal. If the principal does not take the responsibility for the transaction, the other party to the transaction may elect either the principal or the agent in order to implement contractual rights and obligations.⁹⁶ This is in contrast to the right of a principal to ratify an unauthorized transaction in which his identity disclosed. If the identity of the principal is not disclosed in an unauthorized transaction, the non-disclosed principal would not be able to ratify the transaction.⁹⁷

g) Duty to give proper account

Finally, both under Islamic law and conventional law an agent has the duty to give the correct account of the transaction entered on behalf of the principal. Section 689 of *Civil Code* requires that the agent provide the principal with the necessary information the agent received in performing the task and also give an account of all the expenses incurred and the profits made.⁹⁸

⁹⁰ Islamic schools are in agreement that borrowing would not be effected through agency. AL-ZUHAILI, *supra* n. 17 at 640.

⁹¹ See article 1460 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *ibid* at 648-649.

⁹² The reason behind this rule is probably the fact that most of these transactions impose pure financial obligation or they are of very private nature.

⁹³ Section 685 of the *Civil Code*, *supra* n. 3.

⁹⁴ Section 685 of *Civil Code*, *supra* n. 3.

⁹⁵ See the examples under article 1461 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 670-671.

⁹⁶ See ARCHER, *supra* n. 15 at 125-127.

⁹⁷ See ARCHER, *supra* n. 15 at 89-90, 125.

⁹⁸ For similar duty under conventional law, see ARCHER, *supra* n. 15 at 196-198; section 285 of the *Commercial Code* of Oman, *supra* n. 2.

2. Rights of an agent

Both under Islamic law and conventional law,⁹⁹ an agent has three main rights: the right of commission for the work done, the right to reimbursement for the expenses incurred, and the right to indemnification for any liability faced in performing the delegated tasks. This is also clearly mentioned under the *Civil Code* of Oman. The principal must pay an agent the agreed remuneration upon the completion of the delegated task.¹⁰⁰ If the remuneration is not agreed and the agent is someone who is known to work for remuneration, the remuneration would be a reasonable amount usually given for such task.¹⁰¹ Remuneration is due upon the completion of the task.¹⁰² If no remuneration is agreed and the agent is *not* known to be someone who works for fees, the agent would be considered a volunteer and would receive no remuneration.¹⁰³

In addition, if the agent incurs any expenses in the performance of the delegated task, the principal has to reimburse the agent for reasonable expenses.¹⁰⁴ For example, an agent for purchase is entitled to reimbursement of any price he has paid from his own pocket.¹⁰⁵ Similarly, if the agent incurs any liability or obligation, the principal must indemnify the agent for such liability or obligation,¹⁰⁶ provided that such liability or obligation is not incurred due to any negligence or misconduct on the part of the agent. For instance, the principal would take any losses incurred by the agent in the performance of his task.¹⁰⁷

Part 3: Termination of Agency

The last part of the provisions on agency under the *Civil Code* deals with the termination of an agency contract. Termination of an agency contract occurs either automatically i.e., due to the operation of law, or by the parties either unilaterally or mutually. Under Islamic law, agency is considered a permissible (*jaaiz*) but a non-binding (*ghair-laazim*) contract. As such, the contract can be terminated at any time by either party. However, if the agency involves the right of a third party, it cannot be terminated without the consent of that third party according to Hanafi School as well as most jurists from Maliki School.¹⁰⁸ The example of an agency related to the interest of a third party is the appointment of an agent to sell a mortgaged property to satisfy a debt when the debt becomes due. Termination of such an agency would affect the right of the creditor in getting the debt paid on time.¹⁰⁹ Thus, the agency in this case cannot be terminated without the consent of the creditor for whose benefit the agent was appointed. Mirroring Islamic law on the issue, the *Civil Code* provides that if termination of an agency contract would

⁹⁹ For conventional law on the rights of the agent, see ARCHER, *supra* n. 15 at 172-180.

¹⁰⁰ Section 690 of *Civil Code*, *supra* n. 3.

¹⁰¹ Section 690 of *Civil Code*, *ibid*.

¹⁰² AL-ZUHAILI, *supra* n. 17 at 673.

¹⁰³ Section 690 of *Civil Code*, *supra* n. 3; article 1467 of *Mejelle*, *supra* n. 8.

¹⁰⁴ Section 691 of *Civil Code*, *ibid*.

¹⁰⁵ Article 1491 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 673-674.

¹⁰⁶ Section 692 of *Civil Code*, *supra* n. 3.

¹⁰⁷ AL-ZUHAILI, *supra* n. 17 at 673.

¹⁰⁸ AL-ZUHAILI, *ibid* at 684-685; articles 1521 and 1522 of *Mejelle*, *supra* n. 8.

¹⁰⁹ See article 1521 of *Mejelle*, *ibid*.

affect the right of a third party, neither the principal nor the agent can terminate the contract without the consent of the third party.¹¹⁰

Although stated in different terminology, similar result would also ensue under conventional law. Under conventional law, an agency becomes irrevocable when the authority of an agent is coupled with an interest or obligation i.e., the interest of a third party is involved and the agent would be personally liable to meet some obligations arising under the agency.¹¹¹ Thus, it was held in a case that when the principal transferred a piece of real estate to the agent as a security for the benefit of a third party creditor, the death of the principal did not terminate the agency contract.¹¹²

Even though Islamic law does not consider any earlier termination of agency as a breach of contract, compensation is allowed to the non-terminating party for any loss suffered due to untimely termination.¹¹³ Thus, if the agent has already started doing the assigned task and has completed part of it, termination of the contract by the principal may cause financial loss for the agent. Similarly, if the agent leaves the job incomplete, the principal may also suffer some financial loss to start the task all over again. In the same vein, conventional law also imposes liability on the party whose untimely termination causes loss to the other party to an agency contract. However, such a termination is considered a breach of contract under conventional law.¹¹⁴ An untimely termination occurs, for example, when the agency is for a specific period of time and the agent leaves the job in the middle of the contract causing loss to the principal. However, if the contract allows either party to terminate the contract at any time, no liability would be imposed on the terminating party.¹¹⁵

As per the grounds of automatic termination of agency, section 694 of the *Civil Code* provides that an agency contract would be automatically terminated with 1) the completion of the task assigned,¹¹⁶ 2) the expiry of the fixed term,¹¹⁷ 3) death or legal incapacity of the principal unless the agency is related to the right of a third party, 4) death or legal incapacity of the agent even if the agency is related to the right of a third party. These rules are reflective of Islamic law on the subject.¹¹⁸ These are also grounds for automatic termination of agency under conventional law.¹¹⁹

With regard to insanity, Islamic schools of jurisprudence differ on the effect of short term insanity on agency. Shafi'i School considers the agency automatically terminated due to the

¹¹⁰Sections 696 and 697(1) of *Civil Code*, *supra* n. 3.

¹¹¹See ARCHER, *supra* n. 15 at 208-210

¹¹²*Ronald v. Coleman*, 76 Ga. 652, H 203; cited in ARCHER, *supra* n. 15 at 209.

¹¹³Section 696 and 698(1) of *Civil Code*, *supra* n. 3.

¹¹⁴ARCHER, *supra* n. 15 at 208 and 211.

¹¹⁵See ARCHER, *supra* n. 15 at 210-211.

¹¹⁶The task may be completed either by the agent or by the principal. If the principal completes the task, the agency would have no purpose left and thus automatically terminated. See AL-ZUHAILI, *supra* n. 17 at 685. In addition, if it becomes impossible to complete the task due to the fact that the object of agency is perished, the agency would be terminated automatically. AL-ZUHAILI, *ibid* at 687.

¹¹⁷Agency will also terminate with the expiry of the fixed-term agency according to most non-Hanafi jurists. AL-ZUHAILI, *supra* n. 17 at 689.

¹¹⁸See articles 1526-1528, and 1530 of *Mejelle*, *supra* n. 8.

¹¹⁹See ARCHER, *supra* n. 15 at 207 (for the expiry of the term and for the completion of the task) and 211 (for the death and insanity of the principal).

insanity of either the agent or the principal even if the insanity is for a short term. On the other hand, non-Shafi'i jurists do not consider agency contract terminated in the case of temporary insanity. Insanity for less than a month is considered 'short term' insanity according to the majority Hanafi view.¹²⁰ The *Civil Code* of Oman seems to follow the view of Shafi'i School on this matter as there is no mention about any specific duration of insanity for the purpose of legal incapacity. Under conventional law too, the insanity of the principal or the agent would also terminate the relationship of agency and there is no qualification with regard to the duration of insanity.¹²¹

In classical Islamic jurisprudence, there are also discussion and differing juristic views on the effect of apostasy (*riddah*) of a principal or an agent on the agency contract. According to Hanbali School, apostasy of a principal or an agent would not terminate the agency contract mainly because faith is not a condition for a valid agency contract. Other schools have different views. The *Civil Code* of Oman does not mention apostasy at all as a ground for termination of agency. This is probably due to the fact that apostasy is not considered a crime under the *Penal Code*¹²² of Oman.

The *Civil Code* does not also mention the effect of bankruptcy on agency contract. Under the *Commercial Code* of Oman bankruptcy of an agent is considered as a ground for the termination of the agency contract.¹²³ However, legal incapacity as an automatic cause for termination of agency under the *Civil Code* can be interpreted to include any ground for legal incapacity including bankruptcy. Under conventional law, bankruptcy amounts to legal incapacity.¹²⁴ In the context of company law, the managers/directors of a company are considered as agents of the company. When a company becomes bankrupt, these agents lose their usual authority to do any transaction on behalf of the company.¹²⁵ If the company itself works as an agent or principal, dissolution of the company would bring an end to the agency contract.¹²⁶ There is also not much discussion on this issue under classical Islamic jurisprudence due probably to the fact that bankruptcy is a modern legal concept and did not exist under classical Islamic law. However, some Maliki jurists mentioned that if the agency contract is for the sale of the principal's property and the property is later transferred to or preserved for his creditors in a bankruptcy situation, the agent cannot sell the property and the agency would be terminated.¹²⁷

The *Civil Code* does not include also any provisions with regard to a third party's right in a transaction entered by an agent either after his termination or during the existence of an agency contract but exceeding his scope of authority. Conventional law requires a principal to provide general notice of termination of an agent to the public and individual notice to anyone

¹²⁰ AL-ZUHAILI, *supra* n. 17 at 685.

¹²¹ See section 291 of the *Commercial Code*, *supra* n. 2; see also ARCHER, *supra* n. 15 at 211.

¹²² Royal Decree 7/74, published in *Official Gazette* (no. 52) (Ministry of Legal Affairs, Oman: April 1, 1974); amended by Royal Decrees 12/97, 77/99, 4/2000, 72/2001, 75/2005, 6/2007, 52/2007, 36/2009.

¹²³ Section 291 of *Commercial Code*, *supra* n. 2.

¹²⁴ MUNDAY, *supra* n. 9 at 340 para 13.23.

¹²⁵ Section 16 of *Companies Law* of Oman, Royal Decree 4/1974, *supra* n. 2; see also *Pacific and General Insurance Co Ltd v. Haell*, [1997] BCC 400.

¹²⁶ See MUNDAY, *supra* n. 9 at 340-341 para 13.23-13.24.

¹²⁷ AL-ZUHAILI, *supra* n. 17 at 687.

who has dealt with the agent before his termination.¹²⁸ Otherwise, the principal may be liable for the actions of a terminated agent under the concept of apparent authority. Under Islamic law, a principal would not be liable for any action of an agent beyond the scope of his authority or after the termination of agency. Since the *Civil Code* is silent on this issue, it seems that in a non-commercial agency contract the rules of Islamic law would apply in such circumstances.

III. Conclusion

The provisions of agency law under the *Civil Code* of Oman reflect Islamic law on the subject. The rules of Islamic law on agency are very similar to those of conventional laws. Islamic law on the main issues of an agency contract such as the condition of agency and its types, the rights and obligations of agents, and the termination of agency is comparable to conventional law on agency. However, there are some minor differences in the details. While these minor differences may become important in an actual case of agency, they do not affect the main observation of the paper i.e., the existence of close similarity between Islamic law and conventional law on agency contracts. Due to this close resemblance, it may be advisable for Oman to have just one set of rules for all types of agency contracts instead of three different sets of rules¹²⁹ unless the minor differences between Islamic law and conventional law are thought to be important for commercial agencies.

¹²⁸ ARCHER, *supra* n. 15 at 210; see also section 292 of *Commercial Code*, *supra* n. 2.

¹²⁹ See *supra* n. 5 to 7 and the accompanying text.